Hastings Law Journal

Volume 49 | Issue 4 Article 4

1-1998

The Rivalry between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in Jaffee v. Redmond, 518 U.S. 1 (1996)

Edward Imwinkelried

The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in *Jaffee v. Redmond*, 518 U.S. 1 (1996)

by
EDWARD IMWINKELRIED*

The title of this conference is *Truth and Its Rivals*. This segment of the conference is devoted to privilege law. Two questions naturally arise in this context: Is there a rivalry between the pursuit of truth and the promotion of the policies inspiring privilege law? If so, which value should prevail? The purpose of this short Article is to use the Supreme Court's decision in *Jaffee v. Redmond*[1] as a vehicle for exploring these two questions.

I. A Description of the *Jaffee* Litigation

Jaffee was a civil rights action filed under 42 U.S.C. section 1983.[2] The plaintiffs were the heirs of Ricky Allen, Sr. Allen had been shot to death by Mary Lu Redmond, a police officer in the employ of the Village of Hoffman Estates, Illinois. The heirs alleged that Redmond had used excessive force during an encounter with Allen. The heirs named both Redmond and the village as defendants.[3]

During pretrial discovery in the district court, the plaintiffs learned that following the shooting, Redmond had consulted a licensed clinical social worker.[4] The plaintiffs claimed that they needed to review the social worker's notes in order to prepare to cross-examine Redmond at trial. The defendants opposed the dis-

* Professor of Law, University of California at Davis.

1. 518 U.S. 1 (1996).
2. *See id.* at 5.
3. *See id.* at 4.
4. *See id.* at 5.

covery; they contended that there is a psychotherapist privilege under Rule 501[5] of the Federal Rules of Evidence.[6]

The district court judge rejected the defendants' privilege claim.[7] Nevertheless, the defendants refused to answer questions relating to the consultations during depositions and at trial. The judge informed the jury that they could draw an adverse inference from the defendants' refusal to comply with the plaintiffs' discovery request.[8] The jury returned a verdict for the plaintiffs and awarded damages exceeding half a million dollars.[9]

A. The Seventh Circuit Decision

The defendants initially appealed the decision to the Court of Appeals for the Seventh Circuit. Unlike the district court, the Seventh Circuit sustained the defendants' privilege claim.[10]

On the threshold question of whether there is a federal psychotherapist privilege, the Seventh Circuit decided that "reason and experience compel the recognition" of such a testimonial privilege.[11] The court advanced two distinct rationales for doing so.

One rationale was humanistic in nature. Humanistic or intrinsic rationales "treat privileges as corollaries to the rights to privacy and personal autonomy."[12] The court declared that there are "zones of privacy" protecting "personal autonomy."[13] The court emphasized that in "the American legal tradition," the protection of privacy is a

---

5. FED. R. EVID. 501. The rule reads in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Id.

6. *See Jaffee*, 518 U.S. at 6.

7. *See id.*

8. *See id.* at 5. The judge told that jury that the defendant's refusal to turn over the notes had "no legal justification" and that the jurors could therefore presume that the contents of the notes were unfavorable to the defendants. *Id* at 5-6.

9. *See id.* at 6.

10. *See* Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996).

11. *Id.* at 1355-56.

12. Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 543-44 (1994).

13. *Jaffee*, 51 F.3d at 1356.

legitimate "end in itself."[14]

The court also developed an instrumental rationale for creating a psychotherapist privilege. An instrumental justification "argue[s] that privileges should be recognized as a means to the end of promoting certain types of out-of-court conduct such as candid consultations between patients and their" psychotherapists.[15] The court observed that during counseling sessions, a patient frequently divulges "highly personal matters," the public disclosure of which "would . . . be embarrassing to the point of mortification . . . ."[16] The court feared that without an "assurance" of confidentiality, a patient would be reluctant to reveal "his innermost thoughts."[17] Further, the court was concerned that a psychotherapist could not effectively diagnose and treat a patient without such revelations.

Although these rationales persuaded the court to fashion a psychotherapist privilege, the court appreciated that the privilege could obstruct the search for truth.[18] Consequently, the court designated the privilege as qualified rather than absolute. Absolute privileges can be surmounted only by establishing the holder's waiver of the privilege or the applicability of a special exception;[19] the party seeking the allegedly privileged information cannot defeat the privilege merely by showing a compelling need for the information.[20] In contrast, a qualified or conditional privilege can be overridden by a showing of need for the information.[21] The court announced that the trial judge should determine "whether, in the interests of justice, the evidentiary need for the disclosure of the contents of the patient's counseling sessions outweigh that patient's privacy interests."[22]

On the facts of the instant case, the court sustained the defendants' privilege claim.[23] On the one hand, the court perceived little need to override the privilege as the lower court record indicated that

14. *Id.*

15. Imwinkelried, *supra* note 12, at 543.

16. *Jaffee*, 51 F.3d at 1356.

17. *Id.*

18. *See id.* at 1357.

19. *See* RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 681 (4th ed. 1997).

20. *See* Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493-94 (9th Cir. 1989) (stating that there is no necessity exception to the attorney-client privilege when the information sought is not otherwise discoverable).

21. *See* CARLSON ET AL., *supra* note 19, at 681.

22. *Jaffee*, 51 F.3d at 1357.

23. *See id.* at 1358.

there were "numerous eyewitnesses" to the incident.[24] On the other hand, the court recognized that Redmond had a "substantial" interest in protecting the confidentiality of the counseling sessions, since the incident was traumatic in nature.[25]

B. The Supreme Court Decision

Just as the defendants had appealed the district court decision, the plaintiffs prosecuted an appeal from the Seventh Circuit decision. On appeal, over a vigorous dissent by Justice Scalia, the Supreme Court affirmed the Seventh Circuit's decision to sustain the defendants' privilege claim.[26] The majority's opinion, however, differed in three significant respects from the Seventh Circuit's reasoning.

To begin with, the majority eschewed the Seventh Circuit's humanistic rationale and relied exclusively on instrumental reasoning. The majority stated that the topics of consultations are so sensitive that "the mere possibility of disclosure may impede the development of the confidential relationship necessary for successful treatment."[27] In effect, the majority asserted that without the benefit of a privilege, patients would be unwilling to make these types of revelations to psychotherapists. To support this assertion, the Court, in a footnote, referred to "studies and authorities" cited in the American Psychiatric Association's and the American Psychological Association's amicus briefs.[28]

Next, positing that the absence of a privilege would be a significant disincentive for patients to make revelations to psychotherapists, the majority professed that there was little rivalry between the pursuit of truth and the promotion of the policies underlying the psychotherapist-patient privilege. The Court explained:

> the likely evidentiary benefit that would result from the denial of a privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as [plaintiff] seek access—for example, admissions

24. *See id.*
25. *See id.*
26. *See Jaffee*, 518 U.S. 1.
27. *See id.* at 10.
28. *See id.* at 10 n.9.

> against interest by a party—is unlikely to come into being. This unspoken "evidence" would therefore serve no greater truth-seeking function than if it had been spoken and privileged.[29]

If the patient ordinarily would not utter the statement without the protection of a privilege, in most cases the enforcement of a privilege would not result in the suppression of evidence; the statement would not be made but for the existence of the privilege. Thus, starting from its instrumental premise, the majority concluded that the recognition of a privilege would be relatively cost-free.[30]

Finally, based on its assumption that the creation of the privilege would be essentially cost-free, the majority fashioned an absolute privilege.[31] The majority stated:

> We part company with the Court of Appeals on . . . the balancing component of the privilege implemented by that court . . . . Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[32]

The three differences between the Seventh Circuit's and Supreme Court's decisions are closely related. If we accept the instrumental premise that most patients would not divulge their information without the assurance of a privilege, there is little rivalry between the recognition of the privilege and the pursuit of truth; in the typical case, the invocation of a privilege will not lead to the suppression of evidence that would otherwise be available to the judicial system. On that assumption, it makes sense to fashion an absolute privilege. In order to effectuate the instrumental rationale, patients must be able to predict with confidence that their revelations will remain confidential; therefore, the privilege rules should be formulated as bright line standards, and there should be few, if any, exceptions to the scope of the privilege. The creation of even an absolute privilege comes with little cost, and its absolute character seems essential to

29. *Id.* at 11-12.

30. *See id.* at 12.

31. *See id.* at 17-18.

32. *Id.* (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) (footnotes omitted)).

securing the instrumental objective.

The majority's reasoning in *Jaffee* seems plausible. However, as we have learned in the evaluation of scientific testimony, it can be a grave mistake to facilely equate the plausible and the proven.[33] The thesis of this Article is that as plausible as it appears, the majority's instrumental rationale is flawed. Part II of this Article reviews the empirical studies referenced in footnote 9 of the majority's opinion. That Section concludes that those studies do not support the majority's generalization that patients will not make the necessary revelations to psychotherapists without the protection of an evidentiary privilege. Part III explores the implications of the weakness of the majority's instrumental rational.

II. The Weakness of the Majority's Instrumental Argument That There is No Rivalry Between the Pursuit of Truth and the Promotion of the Policies Inspiring a Psychotherapist Privilege

As we have seen, the linchpin of the *Jaffee* majority's reasoning is its assumption that without the assurance of an evidentiary privilege, the typical patient would be unwilling to make the sorts of disclosures that are essential in effective psychotherapy. The majority evidently realized that the truth of this assumption is not self-evident. Consequently, in footnote 9, the majority pointed to "studies and authorities"[34] cited in the amicus briefs filed by the American Psychological and Psychiatric Associations to allegedly substantiate its assumption. On closer scrutiny, however, the substantiation is illusory.

A. The American Psychiatric Association Brief

A careful reading of the American Psychiatric Association's amicus brief demonstrates that the Court in footnote 9 advisedly referred to it as citing "authorities" as well as "studies." That amicus brief does not cite any empirical studies of patients' perceived need for confidentiality in psychotherapy. The citations consist exclusively of writings by mental health experts who simply pronounce that con-

33. *See* Golod v. Hoffman La Roche, 964 F. Supp. 841, 860-61 (S.D.N.Y. 1997) (stating that although the expert's theory was "biologically plausible," it had not been "tested by clinical trials, in animal studies, or otherwise").

34. *Jaffee*, 518 U.S. at 10 n.9.

fidentiality is necessary for effective treatment.[35] The writings assert, *inter alia*, that there is "general agreement among all writers" that psychotherapy requires protection against disclosures and that "[t]here is no disagreement" among such writers on this issue.[36] Without any empirical support, the amicus brief gratuitously adds that these assertions reflect "wide experience" in the mental health profession.[37]

These citations are hardly persuasive. Even if we were to treat the writings collectively as a representative sample of the attitudes of psychotherapists, psychotherapists are not the relevant universe to study. As some of the cited writings themselves acknowledge, the key question is how the recognition of a testimonial privilege impacts the state of mind of the patient.[38] Thus, potential and actual patients constitute the pertinent universe to sample. When it is feasible, as it clearly is here, to sample the correct universe, it is inexcusable to rely on another. The reliance on these authorities is especially suspect, since mental health experts have a distinct bias on the question of the need for a privilege. They have waged a long, intense campaign to persuade both Congress and state legislatures to confer a privilege on their profession.[39] It hardly seems wise to rely on *ipse dixit* assertions by members of the profession.

B. The American Psychological Association Brief

We turn now to the amicus brief filed by the American Psychological Association.[40] Admittedly, this brief makes a stronger case for substantiating the majority's assumption. However, in the final analysis, even this case is unconvincing.

Surveys of therapists rather than patients.

35. *See* Brief of the American Psychiatric Association and the Academy of Psychiatry and the Law as Amici Curiae at 14-15, Jaffee v. Redmond, 518 U.S. 1 (1996) (No. 95-266).

36. *Id.* at 15.

37. *Id.* at 16.

38. *See id.* at 15 (quoting Ciccone, *Privilege and Confidentiality: Psychiatric and Legal Considerations,* 2 PSYCHIATRIC MED. 273 (1985) ("a significant cornerstone to this [therapeutic] alliance is the patient's expectation that the psychiatrist will keep secret what is learned about the patient")).

39. *See generally* 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5522 (2d ed. 1989).

40. Brief Amicus Curiae of the American Psychological Association, Jaffee v. Redmond, 518 U.S. 1 (1996) (No. 95-266) [hereinafter cited as American Psychological Association Brief].

To begin with, some of the authorities cited in this brief suffer from the same weakness as the citations in the American Psychiatric Association's amicus brief. For example, the final study cited on the bottom of page 14 of the American Psychological Association's brief turns out to be a survey of therapists rather than therapists' patients.[41] Likewise, a study referenced on page 15 canvassed therapists rather than patients.[42]

Surveys posing the wrong question.

To be sure, the American Psychological Association brief does mention some surveys of prospective and actual patients; however, several of the surveys have little relevance to the question at issue in *Jaffee*. The very first study cited in the brief is a 1986 article authored by David Miller and Mark Thelen.[43] It is true that this study investigated patients' attitudes on the subject of "confidentiality." The phrasing of the survey questions, however, did not make it clear to the patients that they were being asked about their attitudes toward court-authorized disclosure. The questions inquired about the patients' reaction to revelations to "police," "friends," "family," and "authorities."[44] The revelations to the first three categories specified would presumably have been out of court. Hence, the patients responding might well have believed that the disclosure to authorities would likewise occur without judicial supervision and screening.

Surveys yielding unimpressive findings.

Finally, even if accepted at face value, the findings of the cited studies are unimpressive, despite the American Psychological Association's claims to the contrary. The amicus brief's treatment of the Miller-Thelen study is illustrative. The brief cites to one favorable passage in the study.[45] The brief fails to note the article's acknowledgment of the body of research indicating that the "level of confidentiality has little effect on client behavior."[46]

---

41. *See id.* at 14 (citing Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165, 183 (1978)).

42. *See id.* at 15 (citing Note, *supra* note 41, at 177 n.67).

43. *See* American Psychological Association Brief, *supra* note 40, at 14 (citing David Miller & Mark Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 J. PROF. PSYCHOL., RES. AND PRACT. 15 (1986)).

44. *See* Miller & Thelen, *supra* note 43, at 17.

45. *See* American Psychological Association Brief, *supra* note 40, at 14 (stating that Miller and Thelen noted that "the majority of clients view confidentiality 'as an all-encompassing, subordinate mandate for the profession of psychology'" (citing Miller & Thelen, *supra* note 43, at 18).

46. Miller & Thelen, *supra* note 43, at 15.

In the same paragraph, the amicus brief mentions a 1983 study conducted by a group of researchers led by Donald Schmid.[47] The brief asserts that in this study, the researchers discovered that "sixty-seven percent of patients would be upset or angry if their confidences were revealed without permission."[48] What the brief does not make clear is that the finding in question relates to extra-judicial disclosure. The more pertinent finding is that the response varied with the identity of the recipient of the data; more specifically, only 33% of the respondents would have been upset by release of information to a court.[49] The respondents were much more concerned about out-of-court disclosures to persons such as employers.[50] In the same study, only 17% of the respondents indicated that an unauthorized disclosure of confidential information about them would prompt them to cease treatment.[51]

Still in the same paragraph, the amicus brief cites a 1984 article by Applebaum, Kapen, Walters, Lidz, and Roth.[52] Once again, the brief seizes on a passage in the study which lends some support to the American Psychological Association's position.[53] However, on the whole, the findings reached in the study undercut that position.

The 1984 article begins with a survey of the literature which the authors characterize as "quite limited."[54] The survey canvasses four studies. The survey begins with a discussion of a study which concluded that prospective patients do "not [even] consider the issue of confidentiality unless specifically warned that it might be absent."[55] The survey then turns to another study which inquired about patients' reaction to an unauthorized release of information to state

47. *See* American Psychological Association Brief, *supra* note 40, at 14 (citing Donald Schmid et al., *Confidentiality in Psychiatry: A Study of the Patient's View*, 34 HOSP. AND COMMUNITY PSYCHIATRY 353, 354 (Apr. 1983)).

48. American Psychological Association Brief, *supra* note 40, at 14.

49. *See* Schmid et al., *supra* note 47, at 353.

50. *See id.*

51. *See id.*

52. *See* American Psychological Association Brief, *supra* note 40, at 14 (citing Paul S. Appelbaum et al., *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 109 (1984)).

53. *See id.* (citing Appelbaum et. al., *supra* note 52, at 114, as finding that "fifty-seven percent of patients said therapists' revelations of information without their permission would adversely affect the therapeutic relationship").

54. Appelbaum et al., *supra* note 52, at 110.

55. *Id.* (citing Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982)).

agencies.[56] That study found that "patients would not be deterred from seeking care by a threat (admittedly mild) to confidentiality."[57] The survey next describes a third study conducted in New Jersey. In that survey, only 22% "of the sample reported that they had held back from seeking psychotherapy because of a fear of disclosure."[58] The survey then considers a fourth study in which the researchers discovered that only 8% of the responding patients "would have" sought "treatment earlier" if they had known of a law prohibiting disclosure.[59]

The 1984 study then documents the results of the authors' own investigation. In their study, the researchers questioned inpatients as well as outpatients.[60] In both groups, only a minority of respondents stated that they would have any "[n]egative [r]eaction[]" to a therapist's unauthorized disclosure of confidential information to "courts."[61] As in the 1983 study, the respondents indicated that they were much more concerned about out-of-court disclosure to employers.[62] Summarizing their independent research, the authors concluded that "the outpatients we interviewed did not appear concerned about absolute confidentiality."[63] Their data led the authors to conclude that patients would "seek and participate in psychiatric treatment even in [the] absence" of confidentiality in the form of an evidentiary privilege.[64]

Later on the same page, the amicus brief points to a multi-stage Canadian-American study conducted in the mid-1980s by a group of researchers led by Daniel W. Shuman.[65] The pattern is familiar. The brief highlights a few isolated passages in the study which appear to strengthen the brief's argument.[66] However, those selected passages

56. *See id.* at 111 (citing C.E. Rosen, *Why Clients Relinquish Their Rights to Privacy under Sign-Away Pressure*, 8 PROF. PSYCHOL. 17 (1977)).

57. *Id.*

58. *Id.* (citing J.J. Lindenthal & C. S. Thomas, *Psychiatrists, the Public and Confidentiality*, 4 J. NERV. MENT. DIS. 353 (1963)).

59. *Id.* (citing Shuman & Weiner, *supra* note 55).

60. *See id.* at 113.

61. *Id.*

62. *See id.*

63. *Id.* at 115.

64. *Id.* at 114.

65. *See* American Psychological Association Brief, *supra* note 40, at 14 (citing Daniel W. Shuman et al., *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 INT'L J. L. & PSYCHIATRY, 393 (1986); Shuman & Weiner, *supra* note 55).

66. *See id.* (citing the study as showing "that when clients are told that their therapist might be required to disclose their communications in court, their willingness to discuss

paint a misleading picture of the study's overall findings.

Consider, for instance, some of the other significant findings from the Canadian phase of the study. "Only seventeen percent" of the respondents replied that they "rely most strongly on privilege" law in deciding whether to make disclosures to their therapists; in contrast, the vast majority indicated that they relied on their therapist's own professional ethics.[67] In this phase of the study, the researchers found no "statistically significant difference" between the attitudes of patients in provinces without a privilege and those residing in provinces recognizing a privilege.[68] In Quebec province, which recognizes a privilege, only 7% of the participating patients stated that they "would have sought treatment earlier had they known of a privilege."[69]

The findings in the American phase of the study point in the same direction. In Texas, only 8% of the respondents reported that the existence of an evidentiary privilege would have prompted them to seek treatment earlier.[70] In South Carolina and West Virginia, the corresponding statistic was only 11%.[71] As in the Canadian study, 86% of the respondents indicated that they were relying on the therapist's professional ethics—"not privilege" law—to protect their privacy.[72] Although some American patients reported withholding information from therapists, "[t]his withholding seemed unrelated to the presence or absence of [an evidentiary] privilege, and most of these patients indicated that a privilege would not have resulted in fuller disclosure."[73]

Summarizing the data in both phases of their study, the researchers conclude "that the evidence for the proposition that a psychotherapist-patient privilege is necessary for effective psychotherapy is highly questionable."[74] In the study, "[m]ost . . . patients indicated that a privilege would not have resulted in fuller disclosure" on their part.[75] The bottom line in this study is the finding that "peo-

sensitive topics declines markedly" (citing Shuman et al., *supra* note 65, at 919-20, 926, 929 Appendix Table I)).

67. *See* Shuman et al., *supra* note 65, at 407.
68. *Id.* at 411.
69. *Id.* at 410.
70. *See id.* at 413.
71. *See id.* at 414.
72. *See id.*
73. *Id.* at 416.
74. *Id.* at 417.
75. *Id.* at 416.

ple do not look to [evidence] law for guidance in their decision to enter into therapy or make disclosures in therapy."[76]

The unimpressive nature of the findings in these studies is compounded because the historical experience tends to undercut the instrumental rationale for a psychotherapist privilege. Assume *arguendo* that a majority of the prospective and actual patients *said* that they would not divulge secrets to a therapist without the assurance of an evidentiary privilege. Nevertheless, the history of psychotherapy should give courts pause before accepting the instrumental rationale. In his dissent in *Jaffee*, Justice Scalia asks rhetorically: "If that is so,"—if the majority's instrumental rationale is valid—"how come psychotherapy got to be a thriving practice before the 'psychotherapist privilege' was invented?"[77] On this issue, history is on Justice Scalia's side. Psychotherapy in fact emerged before any jurisdiction conferred an evidentiary privilege on the profession.[78] Shuman, Weiner, and Pinard point out that the profession seemingly flourishes in many jurisdictions which do not recognize any privilege.[79]

C. Summary

On balance, the research data collected in the studies cited in the *Jaffee* amicus briefs lead to the conclusion that, in embracing the instrumental rationale for a psychotherapist privilege, the *Jaffee* majority overestimated the impact of the existence of a privilege on the behavior of the typical patient. As Justice Scalia observed, the question is whether "most, or even many, of those who seek psychological counseling have the worry of litigation in the back of their minds."[80] The available studies do not substantiate the empirical claim that the typical patient is so concerned about the prospect of litigation that the availability of an evidentiary privilege will significantly affect his or her willingness to seek treatment or make necessary revelations to a therapist.[81] In his dissent, Justice Scalia professes that he is skeptical that "a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such coun-

76. *Id.* at 418.
77. *Jaffee*, 518 U.S. at 24 (Scalia, J., dissenting).
78. *See* WRIGHT & GRAHAM, *supra* note 39, § 5522, at 103.
79. *See* Shuman et al., *supra* note 65, at 395.
80. *Jaffee*, 518 U.S. at 24 (Scalia, J., dissenting).
81. *See* WRIGHT & GRAHAM, *supra* note 39, § 5522, at 91, 101.

seling, because of fear of later disclosure in litigation."[82] Rather than bolstering the majority's argument, the studies referenced in the majority's footnote demonstrate that Justice Scalia's skepticism is warranted. Even if we accept the most favorable findings in those studies at face value, they do not support the hypothesis that, in the typical case, the patient would be deterred by the absence of an evidentiary privilege.

It is perhaps understandable that the majority would be so willing to subscribe to the instrumental rationale. After all, the courts' business is litigation. On a daily, often hourly, basis, judges typically focus on litigation. Given that mind-set, judges are likely to find the instrumental rationale particularly plausible; since they devote so much of their professional thought to aspects of litigation, they would naturally be inclined to believe that other persons share their concern. Again the plausible, however, does not equate with the proven.[83]

It would be a mistake to overstate the definitiveness of the available empirical data; the data does not conclusively disprove the majority's behavioral assumption. The studies are few in number.[84] As recently as 1983, there were evidently no relevant empirical investigations.[85] Moreover, the databases in many of the studies are quite small; in one leading study, the database consisted of a mere thirty inpatients.[86] It is therefore impossible to generalize with complete confidence.[87] Further research is unquestionably necessary.[88] However, if the question is whether the available studies prove the assumption underlying the *Jaffee* majority's instrumental rationale, the answer must be no.

The upshot of this analysis is that the operative assumption should be that there is a genuine rivalry between the pursuit of truth and the promotion of the policies underlying the psychotherapist privilege. The available studies do not sustain the conclusion that in all or even most cases, the proffered statement would not have been

82. *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

83. *See* Golod v. Hoffman La Roche, 964 F. Supp. at 860-61.

84. *See* Appelbaum et al., *supra* note 52, at 110 ("The empirical data relevant to the proposition are quite limited"); Miller & Thelen, *supra* note 35, at 15 (noting that there is only "a small amount of research"); Schmid, *supra* note 47, at 353 (noting that there is only limited empirical data).

85. *See* Schmid et al., *supra* note 47, at 353.

86. *See id.* at 353.

87. *See* Miller & Thelen, *supra* note 43, at 18.

88. *See* Appelbaum et al., *supra* note 52, at 116.

made but for the existence of the privilege. The studies do not justify Justice Stevens' confidence that "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being."[89] Quite to the contrary, although the studies are not conclusive,[90] they point to the conclusion that in the typical case, the invocation of the privilege suppresses evidence which would have come into existence even if the privilege did not exist. Thus, the recognition of the privilege does not come relatively cost free, as Justice Stevens would have us believe.

III. The Implications of the Weakness of the Majority's Instrumental Argument

A. The Unsoundness of Relying on the Instrumental Rationale as a Justification for Recognizing a Psychotherapy Privilege

A careful review of the studies cited by the majority leads not only to the conclusion that the recognition of a privilege comes at a cost, the findings in those studies also carry the implication that the cost is excessive. If the only stated justification for the privilege were the instrumental rationale upon which the *Jaffee* majority relied, the Court arguably should have rejected the defendants' privilege claim. The findings in the available studies make Wigmore's classic remark apropos: The "benefits" of the privilege "are . . . speculative; its obstruction is plain and concrete."[91]

The studies uniformly indicate that the availability of a privilege has little or no influence on the typical patient's decisions to seek therapy and to make disclosures to a therapist. Thus, in the run-of-the-mill case,[92] it does not serve the privilege's instrumental rationale to exclude the statement; contrary to Justice Stevens' assertion, the evidence would have "come into being" even if there had been no privilege.[93]

89. Jaffee v. Redmond, 518 U.S. 1, 12 (1996).

90. One question is the relation between the universe of patients' statements and subset of statements proffered at trial. Is the subset sample representative of the universe? To date, there have been no empirical investigations of that question.

91. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2291, at 554 (McNaughton rev. 1961).

92. *See supra* note 90.

93. *Jaffee*, 518 U.S. at 12.

However, in that same typical case, the enforcement of the privilege will tend to frustrate the search for truth. If the statement is being proffered at trial and the objection is on privilege—rather than relevance—grounds, the statement is presumably probative under Federal Rule of Evidence 401.[94] Consequently, to use Justice Stevens' expression, the admission of the statement would further the court's "truth-seeking function."[95] In short, in the typical case the trier of fact will be denied helpful testimony even though the exclusion of the evidence does not effectuate the Court's articulated instrumental rationale.

In framing a general legal rule of presumptive applicability such as an evidentiary privilege, the Court should take into account the balance of policy considerations in the typical case. If that is the case, the norm ought to be that there is no psychotherapist privilege. As one group of researchers frankly conceded, "if patients place little value" on evidentiary privilege, "it may well be that other social goals—for example, ascertaining facts in the pursuit of justice . . . — deserve priority."[96]

B. The Need to Develop a Non-Instrumental Rationale for Recognizing a Psychotherapy Privilege

If the majority's instrumental rationale is flawed, two choices remain: either reject the psychotherapist privilege or develop an alternative, non-instrumental rationale for recognizing the privilege. As previously stated, in its opinion in *Jaffee*, the Court of Appeals for the Seventh Circuit relied on non-instrumental as well as instrumental rationales.[97] In an Article as short as this one, it would be presumptuous to attempt to develop a definitive humanistic rationale for a psychotherapist privilege. However, it is possible to sketch[98] the contours of that rationale and indicate why the psychotherapist privilege is an especially attractive candidate for such a rationale.

In the past, there have been efforts to construct a humanistic, non-instrumental rationale for privilege doctrine. The efforts have

94. FED. R. EVID. 401.

95. *Jaffee*, 518 U.S. at 12.

96. Schmid et al., *supra* note 47, at 353-54.

97. *See Jaffee*, 51 F.3d 1346.

98. The author is in the process of revising the privilege volume of the Wigmore Evidence treatise. The author intends to develop this topic in greater depth in the revised volume.

endeavored to justify evidentiary privileges on such grounds as the protection of privacy. Highly respected commentators including Professor Louisell[99] and Dean Krattenmaker[100] have proposed grounding privilege doctrine on the value of privacy.

At first blush, that proposal seems promising. Many of the relevant mental health professions have adopted ethical codes, requiring practitioners to maintain the privacy of confidential information divulged by patients.[101] Perhaps more importantly, in several respects the judicial system has elevated that duty to legal status. A large number of courts have invoked tort[102] or constitutional[103] law to enforce the duty.

As promising as the proposal appears initially, however, standing alone, privacy cannot serve as the ultimate basis for formulating privilege doctrine; it would be difficult to view privacy as the ultimate, intrinsic good underlying privilege doctrine. To begin with, as a right, privacy is of recent vintage. The advent of the privacy torts is a modern legal phenomenon.[104] At the constitutional level, the recognition of privacy has an even shorter lineage. In civil constitutional jurisprudence, it was not until 1965 in *Griswold* that the Court found a generalized privacy right in the ninth amendment.[105] In fourth amendment jurisprudence, the advent was even later; not until 1967 in *Katz* did the Court declare that the amendment protects privacy, not property.[106]

Moreover, in principle, it is impossible to defend the proposition that privacy is either an ultimate value or an inherent moral good. Privacy is simply not an ultimate value in liberal democratic theory. Nor is it an intrinsic moral good. It is true that persons seeking spiritual counseling value the privacy of their consultations with religious

99. *See* David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956).

100. *See* Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973).

101. *See* Schmid et al., *supra* note 47, at 353 (citing the codes of ethics for psychology, social work, and nursing).

102. *See* WRIGHT & GRAHAM, *supra* note 39 at § 5522, at 75 (stating "a cause of action for extra-judicial breaches of confidentiality").

103. *See id.* at § 5572, at 527 (citing *In re* Lifschutz, 2 Cal. 3d 415 (1970); State v. Nelson, 61 Cr.L. (BNA) 1358 (Mont. June 24, 1997)).

104. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS Ch. 20 (5th ed. 1984).

105. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

106. *See* Katz v. United States, 389 U.S. 347 (1967).

functionaries such as priests.[107] However, it is equally true that criminal conspirators value privacy. Revolutionaries planning the violent overthrow of the state are especially jealous of the privacy of their discussions.

Thus, if we are going to construct a deontological[108] case for evidentiary privileges, privileges must be linked to an ultimate value or primary good[109] other than privacy.

Autonomy is the most obvious candidate. It is conceived as an ultimate value in a liberal democratic system such as ours.[110] In a pluralist society, the person has a substantial degree of autonomy to determine the content of his or her own life plan.[111] In a liberal democratic society, the individual citizen is a chooser,[112] and he or she has the right to select the preferences which define his or her life plan.[113]

The question is whether privacy and privilege can be linked to autonomy. The existence of a link is hardly self-evident; indeed, the link is arguably counter-intuitive. Autonomy is often viewed as the right to decide and act independently; it seems to assume an atomistic individual in solitude or isolation.[114] However, relational privacy assumes an individual situated in a community.[115]

Yet, on closer scrutiny, there is a link. There is a strong argument that in certain contexts in modern society, privacy is essential to the effective exercise of autonomy. More specifically, privacy promotes autonomy by facilitating intelligent, independent life preference choices.

As previously stated, autonomy is the right to make choices as to certain preferences.[116] However, the autonomy in question is not the autonomy of a self-sufficient[117] hermit or recluse isolated from soci-

107. *See* 1 MCCORMICK ON EVIDENCE § 76.2, at 286-87 (4th ed. 1992).

108. *See* Appelbaum et al., *supra* note 52, at 109.

109. *See* CHANDRAN KUKATHAS & PHILLIP PETTIT, RAWLS: A THEORY OF JUSTICE AND ITS CRITICS 25, 55 (1990).

110. *See* BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 57 (1994).

111. *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 4, 18 (1988).

112. *See id.* at 18, 65; *see also* RONALD BEINER, WHAT'S THE MATTER WITH LIBERALISM 32 (1992); CHARLES FRIED, AN ANATOMY OF VALUES 112-13 (1970).

113. *See* DWORKIN, *supra* note 111, at 4, 18, 26, 31, 65.

114. *See* BEINER, *supra* note 112, at 17, 23.

115. *See id.* at 29.

116. *See* DWORKIN, *supra* note 111, at 4, 18, 26, 31, 65.

117. *See id.* at 23.

ety; again, it is the autonomy of a social being[118] situated in a society. In some contexts, the individual citizen cannot make an intelligent, autonomous choice unless he or she is guaranteed the opportunity to consult third parties.[119] If the person's life plan collides with that of another citizen, the person may need to resort to the litigation system to pursue his or her plan. The litigation system gives the individual the right to make choices as to the assertion or waiver of substantive and procedural rights.[120] However, the individual lacks the expertise to fully appreciate the consequences of the choices; thus, as the Supreme Court itself has remarked, the individual needs "the guiding hand of counsel"[121] to make those choices in a reflective manner. Likewise, irrespective of the content of the person's life plan, he or she needs to maintain physical and mental health in order to effectively pursue the plan. Our medical care system affords the individual a wide range of choices,[122] but as in the case of the legal system, the individual lacks the expertise to understand the full range of choice.[123] Again, the individual has a substantial range of choice in structuring his or her personal and family life.[124] However, a rational individual[125] will want to know the preferences of the other persons directly affected by those choices.[126] Before making a decision that could dramatically affect his or her family, any rational spouse would want to know the relevant aspects of the life plan of the other spouse. In all these settings, a right to consult another person is a condition for the effective exercise of the citizen's autonomy.[127]

Thus, consultation enhances the person's opportunity to make an intelligent choice. The dilemma is that the same consultation imperils another aspect of truly autonomous choice—namely, its independence. The consultation gives the consultant the opportunity to exercise coercion and manipulation and consequently could under-

118. *See* FRIED, *supra* note 112, at 105.

119. *See* DWORKIN, *supra* note 111, at 12, 56.

120. *See* STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 27-29 (1988).

121. Powell v. Alabama, 287 U.S. 45 (1932). *See also* Gideon v. Wainwright, 372 U.S. 335 (1963).

122. *See* DWORKIN, *supra* note 111, at 101-04.

123. *See id.* at 113.

124. *See* KUKATHAS & PETTIT, *supra* note 109, at 20, 43.

125. *See* DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, ECONOMIC ANALYSIS AND MORAL PHILOSOPHY 64 (1996).

126. *See* DWORKIN, *supra* note 111, at 23.

127. *See id.* at 104.

mine the independence of the choice.[128] The threat is a real one, given the nature of the information conveyed to the consultant and the character of the relation between the person and the consultant. When the consultant is an expert, the nature of the consultant's advice makes it difficult for the person to second-guess the advice because the person lacks the expertise to formulate the advice in the first instance. Moreover, these are not arm's length relationships between strangers. The person is consulting either a fellow family member or an expert who avows that he or she is committed to helping the person pursue the person's interests. The nature of the relationship is likely to incline the person to accept the consultant's advice and statements at face value. That inclination makes the person especially vulnerable to coercion and manipulation.

At this point, Joseph Raz' positive theory of freedom is highly pertinent.[129] A liberal democratic society should not only intervene to protect autonomy when the violation of a person's autonomy is certain or probable. More broadly, society should act to create conditions conducive to autonomy[130]—in this setting, conditions that conduce to truly autonomous life preference choice. In particular, society should create conditions which give the person good reason to trust that the consultant will make a bona fide effort to assist the person to make an intelligent, independent choice.

Charles Fried has argued that in general, privacy is the moral capital of trust.[131] As he has written, trust requires an intimacy based on "the sharing of information about one's actions, beliefs or emotions which one does not share with all."[132] In short, privacy is the currency of trust.[133] The basis of mutual trust is one citizen's willingness to surrender privacy by sharing information about himself or herself and another citizen's responsive willingness to maintain the privacy of the shared information as against third parties. Hence, the maintenance of privacy is "essential" to the creation of trusting relationships.[134]

More specifically, the creation of a private, intimate enclave for the person and the consultant will enhance the person's ability to

128. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 373, 377-78 (1986).
129. *See id.* at 408-10.
130. *See id.*
131. *See* FRIED, *supra* note 112, at 81.
132. *Id.* at 142.
133. *See id.*
134. *See id.*

make intelligent, independent life preference choices. In such an enclave, the person will be free to disclose to the consultant all information relevant to the person's life preferences. That disclosure will enable the consultant to give the person more informed advice and, hence, increase the probability that the person will make an intelligent choice. Moreover, in the enclave, the consultant will be free to advise the person without concern about the potentially conflicting preferences of third parties. That freedom will reduce the risk of manipulation and thereby increase the probability that the person's ultimate choice will be an independent one. In this line of argument, the creation of an evidentiary privilege is conceived as a means of creating the necessary enclave.

It is important to note several features of this line of argument. To begin with, this argument is not instrumental in the same sense as the Supreme Court's reasoning in *Jaffee*. The linchpin of this line of argument is the positive theory of freedom. The theory is a normative proposition rather than an empirical hypothesis. As such, the theory is tested by examining its consistency with liberal democratic theory rather than by subjecting it to experimentation or scientific investigation. Further, this argument differs from the humanistic theory advanced by the Seventh Circuit in *Jaffee*. That court identified privacy as the ultimate value to be promoted by recognizing privileges.[135] To be sure, privacy has a role to play here. However, in this line, privacy is neither a primary right nor an ultimate value. At most, privacy is a derivative right. More specifically, it is a condition conducive to creating the intimate enclave which promotes truly autonomous life preference choices—choices that are both intelligent and independent.

The linkage between privacy and the primary good of autonomy unquestionably requires more extended analysis. Unfortunately, to date, there has been little discussion of the connection between autonomy and privacy in the philosophic literature.[136] However, my primary purpose today is simply to suggest that the exploration of that connection may be the key to developing a new humanistic rationale for privilege doctrine.

Conclusion

In 1993, the Supreme Court handed down its decision in *Daubert*

135. *See* Jaffee v. Redmond, 51 F.3d 1346 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996).
136. *See* DWORKIN, *supra* note 111, at 161.

v. Merrell Dow Pharmaceuticals, Inc.[137] There the Supreme Court addressed the standard for determining the admissibility of purportedly scientific testimony. The *Daubert* Court correctly perceived that the validity of one type of claim—a scientific hypothesis—turns on the extent of the empirical validation of the claim.[138] Given *Daubert*, the *Jaffee* Court's failure to more closely scrutinize the empirical assumptions underlying defendants' privilege claim is particularly disappointing. The studies relied upon by the majority fall far short of substantiating the instrumental rationale the majority advanced. The *Jaffee* Court should either have rejected the privilege claim or undertaken to develop an alternative rationale for recognizing the privilege.

The importance of the *Jaffee* decision transcends the psychotherapy privilege. The conventional wisdom is that the traditional instrumental rationale for privilege doctrine is strongest in this setting. If the rationale fails here—as it appears to—the failure calls into question the propriety of relying on the rationale in many other settings, including the broader medical privilege,[139] the spousal privilege,[140] the corporate attorney-client privilege,[141] and the clergy privilege.[142]

For the past few decades, an "abolitionist wave" has been dominant in Anglo-American evidence law.[143] There has been a marked general trend toward the relaxation of evidentiary admissibility standards. Privilege doctrine has been the only doctrinal area which has largely resisted the trend.[144] The durability of privilege doctrine may reflect a perceived need for privacy in modern liberal democratic society.

Nevertheless, the future of privilege law is hardly secure. As we move farther into the post-*Daubert* era, judges and lawyers will be-

137. 509 U.S. 579 (1993).

138. *See generally* Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715 (1994).

139. *See* 1 MCCORMICK, *supra* note 107, at 98.

140. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 5.34, at 610 (1995) (describing the position taken by the Advisory Committee which drafted the Federal Rules of Evidence).

141. *See* 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5476, at 145, § 5483, at 310 (1986).

142. *See* 1 MCCORMICK, *supra* note 107, § 76.2.

143. *See* Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. JURISPRUDENCE. 279 (1996).

144. *See id.* at 282.

come more adept at identifying essentially empirical issues and more readily recognize when the proffered validation falls short. Many of the assertions made by the *Jaffee* majority are empirical claims, and the authorities arrayed in the amicus briefs cited in the majority's footnotes fall far short of substantiating those claims. Unless we undertake the difficult task of constructing an alternative, humanistic rationale for privileges, privilege doctrine, like junk science, may soon fall into disrepute.